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IN THE

# Supreme Court of the United States

NO. 599

..... TERM, 1948

ANTHONY P. MILLER, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.**

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Anthony P. Miller, Inc., the petitioner above named, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above-entitled cause on November 18, 1947.

### Opinions Below.

The opinion of the Tax Court (R. 3 a) and the dissenting opinion filed in the Tax Court are reported in 7 T.C. 729, and the opinion of the Circuit Court of Appeals (R. 50) is reported in 164 F. (2d) 268.

## Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 18, 1947 (R. 50). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented.

1. Whether the rule of *Lincoln Electric Company v. Commissioner,* 162 F. (2d) 379 (1947), which holds that the Tax Court, under the provisions of the Administrative Procedure Act, is not a "Court" and that, therefore, the rule of *Dobson v. Commissioner,* 320 U.S. 489, page 501, should not prevent a review of the entire record on issues of fact, now governs appellate jurisdiction in tax cases reviewed by Circuit Courts of Appeal.

2. Whether *Dobson v. Commissioner,* 320 U.S. 489, and the later similar decisions of the Supreme Court requires affirmances of the decision of the Tax Court on the five issues admitted to be issues of fact affirmed by the Circuit Court of Appeals.

## Statutes and Regulations Involved.

The pertinent Statutes and Regulations are printed in the Appendix, *infra,* pp. 21, 22.

## Statement.

The facts in this case were stipulated in part (R. 3), and where not stipulated were established by evidence introduced by the taxpayer. Six issues were before the

Tax Court. Five presented issues of fact and one presented an issue of law. The Tax Court decided all six issues against taxpayer. On appeal to the Circuit Court of Appeals for the Third Circuit, the Tax Court was reversed on the one issue of law and affirmed on the issues of fact. The issue of law had to do with the question as to whether or not payment by demand promissory notes was a payment as prescribed by Section 24(c) of the Internal Revenue Code so as to permit the deduction of the salary thus paid. This issue is not involved in this petition for writ of certiorari.

The issues of fact which petitioner seeks to have reviewed by this Court all refer to the year 1940 and are:

1. Should petitioner be allowed a deduction of the $42,000 bonus and salary it authorized for its President for 1940, or should same be limited to the $25,000 allowed by respondent as reasonable compensation?

2. Should petitioner be allowed in 1940 a loss on its investment in the stock of Chelsea Housing Corporation?

3. Should petitioner be allowed to exclude from 1940 income the shares of stock of Chelsea Housing Corporation received on account of services? If a value must be assigned to these shares, what is a proper value?

4. Should petitioner be allowed to exclude from 1940 income the shares of stock of Ogontz Housing Corporation received on account of services? If a value must be assigned to these shares, what is a proper value?

5. Should petitioner be allowed to exclude from its 1940 income the shares of stock of Foster Park Housing

Corporation received on account of services? If a value must be assigned to these shares, what is a proper value?

The facts relied upon by petitioner are as folows:

1. Anthony P. Miller was the President and Chief Executive Officer of petitioner in 1940. Petitioner was engaged in the building construction business. Mr. Miller was responsible for initiating and obtaning the work on which the Company was engaged in 1940; for financing the same, for personally superintending all jobs in process in 1940; for making plans and estimating all costs both before and after a job was obtained; and, generally speaking, was the person chiefly responsible for pricing, bidding and obtaining work for petitioner and for carrying the same through to completion. In 1940 Anthony P. Miller had the experience of twenty years of continuous work in the same line of business back of him. (Stipulation of Facts, Paragraph 2.) (R. 3-4 a)

*Compensation Issue*

2. Anthony P. Miller, petitioner's President and Chief Executive, was 49 years old at the time of the hearing. He had worked for a living for 33 years. From 1916 to 1926 he was employed by James Ferry Company, foundation engineers. Since 1927 he had been in the construction and engineering business for himself, first individually, later through the Atlantic Construction Company, which he organized and controlled, and finally through petitioner into which Atlantic Construction was merged. Miller organized petitioner and is the controlling owner of its stock. His knowledge of engineering and construction was derived principally from his practical experience in these fields rather than from formal

or academic training. Miller holds ten patents on special foundations which he designed. Several buildings and railroad facilities in Atlantic City are supported by Miller's patented foundations (Opinion, Tax Court, R 5 a).

3. Petitioner's operations in 1940 were the largest in five years. In 1936 petitioner had, for a period covering two years, $2,000,000 in contracts. During 1940 it had six construction projects in progress totalling over $3,000,000. The increased volume of operations in 1940 imposed additional burdens on Miller. In 1940, Miller obtained a $400,000 loan for the benefit of petitioner. To obtain this loan he and his wife put up about $500,000 worth of personal collateral and security. During 1940, petitioner unsuccessfully bid on approximately $25,000,000 worth of contracts. Miller was assisted in making the estimates for these bids by a small office staff and was required to spend considerable time himself in their preparation and submission. About 75% of petitioner's construction work in progress during 1940 was being done by subcontractors. It was necessary for him to travel from project to project to fulfill his supervisory functions. Difficulties were encountered with subcontractors who required financing and it was necessary in seven instances for petitioner to finish work which certain subcontractors were unable to accomplish. Miller's supervisory activities kept him away from Atlantic City almost five days a week. He kept in touch with his office by telephone and was required to do most of his office work at night and on week-ends. Petitioner's office staff consisted of a bookkeeper, an office engineer, a secretary and two clerks. The salaries of this staff ranged from $30 to $75 a week. Miller did not hire additional help for petitioner as his experience in the past with field super-

intendents and engineers had been unsatisfactory (Opinion, Tax Court, R. 6 a). In 1940 Miller devoted all of his time to petitioner's business and acted as supervisor, engineer, public relations representative, designer and negotiator of contracts (Opinion, Tax Court, R. 4 a).

4. In each of the years 1936 and 1937, Miller received as compensation $20,000 of which one-half was paid by the Atlantic Construction Company and one-half was paid by petitioner. In 1938, 1939 and 1941, he was paid a basic salary of $12,000 a year without any bonus. For his services during 1940 he received as compensation a basic salary of $12,000 plus a bonus of $30,000, or a total compensation of $42,000. As controlling stockholder, Miller determined the amount of salary and bonus he was to receive (Opinion, Tax Court, R. 6 a), (Stipulation of Facts, Paragraphs 13, 14 and 15, R. 5).

5. The Commissioner determined that $25,000 instead of $42,000 was a reasonable amount for Miller's compensation for 1940 (R. 5).

*Chelsea Housing Corporation Stock Issues.*

6. In 1940, petitioner completed a housing project known as Chelsea Village Apartments. The history of this project is as follows:

In 1938, a group of labor union representatives, under the name of Providence Housing Corporation, unsucessfully attempted to persuade the Federal Housing Administration (referred to as F.H.A.) to insure a mortgage on a housing project in Atlantic City, New Jersey. Providence Housing Corporation then appealed to petitioner for help. After preliminary discussions petitioner agreed to lend its assistance sponsoring the project.

Petitioner was influenced and swayed by an appeal that the project was a community project which would benefit the city, and labor organizations. After negotiations, financing was agreed to by the F.H.A., the Irving Trust Company of New York and petitioner. The Trust Company agreed to place the mortgage on the project and F.H.A. agreed to insure same. Petitioner was required to raise the necessary junior capital (R. 6).

7. This arrangement was carried out. The mortgage was for $875,000 and ran for 28 years commencing May 1, 1939, with interest at 4½% per annum. Interest was payable on the first day of August, 1939, and quarter annually thereafter up to and including the first day of November, 1940. Thereafter, commencing on the first day of February, 1941, quarter annual installments of interest and principal were to be paid in the sum of $14,218.75, each of such payments to continue quarter annually thereafter on the first day of May, August, November, and February, until the entire debt had been paid. The whole balance of principal, if any, remaining unpaid, plus interest accrued, was due and payable on the first day of May, 1967 (Opinion, Tax Court, R. 8 a).

8. Pursuant to this arrangement petitioner organized the Chelsea Housing Corporation (hereinafter referred to as Chelsea), which was to own and operate the proposed project. Petitioner, in fulfillment of its agreement with F.H.A. and the Irving Trust Company, furnished junior capital to Chelsea in the amount of $100,000 cash in return for 1,000 shares of Chelsea common no par stock. It also conveyed to Chelsea land costing $79,287.97. Petitioner received 958 shares of Chelsea common no par stock in return for this land (Opinion, Tax Court, R. 8 a).

9. Petitioner contracted to construct the Chelsea project for a cash consideration of $897,783, plus 390 shares of Chelsea common no par stock. Construction began in May, 1939. Completion was anticipated by October 1939 but due to material shortages and unseasonable weather conditions the project was not completed until July 1940. This project was located about one mile from Atlantic City's downtown business district. It was a low rental property consisting of four main buildings with a total of 261 family units. Due to the delay in completing the project, advantage could not be taken of the fall of 1939 and spring 1940 seasons which are the customary rental seasons in Atlantic City. Rental conditions in general in Atlantic City in 1940 were depressed. There had been an exodus from Atlantic City to other areas where more lucrative war jobs were available. Competition in the housing field was keen and rentals consequently were down. Chelsea obtained permission from F.H.A. in June 1940 to reduce rents for Chelsea Village Apartments. The reduction in rental rates resulted in a total reduction in anticipated income of $9,870 a year (Opinion, Tax Court, R. 9 a).

10. Throughout 1940 Chelsea Village Apartments had financial difficulties. Partially due to the delay in completing the project and the resulting loss of rent the mortgage was in default early in that year. The project was also, in 1940, constantly behind in paying its current expenses and could obtain no further credit. Operating expenses were running higher than expected and the project needed additional working funds. Rents could not be raised for com[illegible] reasons and the Irving Trust Company refused to [illegible]y the terms of the mortgage. Under these unfavorable circumstances Miller, as

president of Chelsea and of petitioner, was considering abandoning the project. However, Thomas D. Wootton, rental manager of the project, persuaded him to continue in control. At Wootton's suggestion Miller, acting for petitioner, made financial arrangements to meet the installment due on the mortgage in November 1940. Miller obtained a loan on behalf of Chelsea for $10,000 from the Mainland Bank, Atlantic City. He also guaranteed the project's accounts payable (Opinion, Tax Court, R. 10 a).

11. In the third week in November 1940, petitioner was informally notified that this project had been assessed for local tax purposes at a value of $850,000. This assessment was made as a basis for taxes to be levied for 1941. At the rate of $6 per $100 value, the rate in effect in 1940, the assessment indicated a local tax for 1941 of over $50,000. Under local tax procedure formal notification of the assessment was not made until January 1941 and the rate of the tax on the assessed value was not determined until July 1941. The prospect of a possible $50,000 local tax expense in 1941 was discouraging to the sponsors of the project in November 1940 when they informally learned of it. In 1939, when petitioner was negotiating with the Irving Trust Company and F.H.A. it had an understanding with the then mayor of Atlantic City that local taxes on the proposed project would not exceed $18,000. This understanding was in the nature of a gentleman's agreement and was known to be legally unenforceable. A new mayor came into office in May 1940, who was antagonistic to petitioner and its president, Miller, and who did not feel bound by his predecessor's commitment. Consequently, the $850,000 value assessment made in 1940 and the anticipated tax levy

thereon of over $50,000 in 1941 came as an unexpected increase in prospective expenses to the project. Miller, acting for petitioner, was persuaded to make further advances to the project in 1941. These advances were used principally to meet current operating expenses. Wootton, the project rental manager, advised petitioner to make such advances in order to retain control of the project until sufficient rentals could be received to recover these and prior advances (Opinion, Tax Court, R. 10 a-11 a).

12. F.H.A. assumed possession and control of the project on August 27, 1941 because of the continued mortgage defaults. Under F.H.A. management the local tax assessment made in November 1940 was appealed and heard in the fall of 1941. As a result of this appeal the project was reassessed at $500,000, which reduced the local tax levy for 1941 to approximately $30,000. On September 15, 1942, the mortgage was foreclosed. At the foreclosure sale the mortgagee, the only bidder present, bought the property at a nominal price. Pursuant to the terms of the mortgage-insurance contract, title was conveyed to F.H.A. by the mortgagee in return for F.H.A. bonds. In April, 1943 F.H.A. sold the project to agents of a later formed corporation entitled Chelsea Village, Incorporated. The sale price was $875,000, of which $30,000 was paid in cash. The unpaid balance of the purchase price was secured by a mortgage bearing interest at 3% per annum (Opinion, Tax Court, R. 12 a).

13. During 1940 Miller attempted to raise money to finance petitioner's construction projects. He offered Chelsea stock as collateral. Several private banks and other agencies refused to accept such stock as security

for any proposed loan to be made by them (Opinion, Tax Court, R. 12 a).

14. Petitioner, in its original income tax return for 1940, did not claim any deduction for loss arising from Chelsea's stock becoming worthless. Petitioner claimed that such deduction was not taken in its original return for 1940 for the reason that such return showed no taxable income and that, therefore, there was no advantage in taking further deductions. Respondent, after making certain adjustments not here material, determined that petitioner did have taxable income in 1940. Petitioner then claimed a deduction for the alleged loss sustained as a result of Chelsea's stock becoming worthless. Petitioner claims a deduction of $179,000 as a loss resulting from the worthlessness of the 1,958 shares of Chelsea stock it received in return for its furnishing $100,000 cash and conveying land costing some $79,000. These 1,958 shares were received by petitioner on May 3, 1939. Petitioner further claims that the 390 shares of Chelsea stock which it received on July 5, 1940, in partial payment for constructing the project, is not includible as income in 1940 since such stock became worthless in that year. Alternatively, petitioner claims that if such 390 shares be included in its income at $100 a share, as respondent determined, then petitioner claims a further deduction of $39,000 representing a loss resulting from this stock becoming worthless in 1940. In other words, petitioner claims a loss of $218,000 if the 390 shares are included as income, otherwise it is claiming a loss of $179,000. Respondent's own Revenue Agent reporting on the value of said 390 shares, reported that the same had no value when received in 1940. Respondent determined that Chelsea stock did not become worthless in 1940 and that,

therefore, no loss was sustained or is deductible by petitioner on account of such stock. Respondent further determined that the 390 shares of Chelsea stock received by petitioner in 1940 had a fair market value of $39,000 and is, therefore, includible in petitioner's income to such extent. The Tax Court sustained the respondent on both points (Opinion, Tax Court, R. 13 a).

15. Petitioner produced three witnesses who qualified as experts and who testified that the book value of Chelsea's assets in 1940 was greatly in excess of actual values. The values thus testified to were all less than the mortgage debt on the property and that therefore the stock at issue had no liquidating value (R. 14).

The Commissioner offered no testimony on this issue. The Tax Court approved the Commissioner's determination that this stock had a value of $100 a share in 1940.

*Ogontoz Housing Corporation Stock Issue*

16. Petitioner on or about August 24, 1940 received 449.6 shares of common, no par stock of Ogontz Housing Corporation, hereinafter referred to as Ogontz. These shares were received in partial compensation for services as general contractor in connection with the construction of Ogontz Manor Apartments located in Philadelphia, Pennsylvania. This project consisted of three seven-story brick buildings containing a total of 203 apartments. F.H.A. was insurer of the project's mortgage of $875,000, and Thomas D. Wootton was rental manager. The project was completed in July, 1940. Its operations for the fiscal year ending March 31, 1941, showed a net loss of $51,015.58. The mortgage, although not foreclosed, was

in default in 1940 since the first payment was due. The project is still in the hands of Ogontz (Opinion, Tax Court, R. 14 a).

17. George S. Idell was the project's architect. He received 350.4 shares of Ogontz common no par stock in part payment for his services. He received some of this stock in 1939 and some in 1940. As a condition to Idell accepting this stock in partial payment it was arranged that petitioner would relieve Idell of certain shares of this stock for cash. Pursuant to this arrangement Idell transferred to petitioner 116.4 shares receiving in return $8,270 in cash. This transfer occurred in 1939 (Opinion, Tax Court, R. 17-14 a).

18. During 1939 and 1940 Idell offered to sell other shares of Ogontz stock at 25 cents on the dollar to various individuals, including petitioner and Wootton, manager of the project, without success. It was refused by a bank as collateral. Idell attempted selling through a broker specializing in unlisted securities. This broker unsuccessfully attempted to sell this in 1939 and 1940. Idell instructed the broker to get whatever price he could. Petitioner, in 1940, offered shares of Ogontz stock as collateral without success (Opinion, Tax Court, R. 14 a).

19. A summary of Ogontz's balance sheet as of March 31, 1941 showed, at book values, a net worth in excess of $100 a share, and the corporation's profit and loss statement for the year ending March 31, 1941 showed a net loss for the year of $51,015.58 (Opinion, Tax Court, R. 16 a).

20. Three witnesses who qualified as experts testified that this stock was worthless in 1940 (R. 19).

21. The Tax Court fixed $71 a share as the value of this stock (R. 38 a).

*Foster Park Housing Corporation Stock Issue*

22. Foster Park Apartments located in Wilmington, Delaware, is a project owned and operated by Foster Park Housing Corporation, hereinafter referred to as Foster. The project was completed in December 1940 at which time tenants first began occupancy. The project was subject to a $340,000 mortgage insured by F.H.A. Petitioner was the general contractor for the construction of this project. On February 5, 1940, petitioner contributed $30,000 to Foster in return for 300 shares of Foster common, no par, stock. Petitioner sometime in 1940 received 67.64 shares of Foster Stock in partial payment for services rendered (Opinion, Tax Court, R. 17 a-38 a).

23. Morton Keast was architect of the project. He received 177.37 shares of Foster stock in 1940 as partial payment for his services. Keast included these shares in his income for 1940 in the amount of $7,480. The inclusion of these shares at such value in Keast's 1940 income has never been questioned by the Commissioner. In 1941 Keast obtained a loan in an unspecified amount from a bank using Foster stock as collateral (Opinion, Tax Court, R. 38 a). Keast testified this stock had no value in 1940. Miller testified this stock had no value in 1940. Respondent offered no testimony on the issue.

24. Foster's balance sheet as of December 31, 1941 shows current assets of $17,648.46, current liabilities of $967.27, and a total net worth of $101,938.80. Foster's profit and loss statement in the year ending December

31, 1941, shows a net profit of $3,638.80 (R. 20). Petitioner, on the theory that the stock was worthless when received, did not include the 67.64 shares of Foster stock in its income for 1940. The Commissioner determined that these shares constituted income to petitioner in 1940 at $100 a share or in the total amount of $6,764. Respondent offered no testimony on this issue. The Tax Court decided that petitioner had not overcome the presumption of correctness of the Commissioner's determination that this stock had a fair value of $100 a share when received in 1940 (Opinion, Tax Court, R. 38 a).

25. The Circuit Court of Appeals affirmed the Tax Court on all of the above five issues upon the basis of *Dobson v. Commissioner,* 320 U.S. 489.

**Specification of Errors to Be Urged.**

The Circuit Court of Appeals (the Court below) erred:

1. In holding that the decision of the Tax Court must be affirmed on the basis of the rule of *Dobson v. Commissioner,* 320 U.S. 489.

2. In affirming the decision of the Tax Court.

**Reasons for Allowance of the Writ.**

In *Lincoln Electric Co. v. Commissioner,* 162 F. (2d) 379 (1947), the Circuit Court of Appeals for the Sixth Circuit held that review of Tax Court decisions is governed by the Administrative Procedures Act, § 1, et seq., 5 U.S.C.A. § 1001 et seq., 26 U.S.C.A. Internal Revenue Code § 1100 (See Appendix, *infra,* pages 21, 22).

The Opinion of that Court on this point states that:

"The taxpayer, though insisting that we are not prevented from reviewing decision by the Dobson rule, for the first time suggests that Dobson is no longer applicable in view of the recently enacted Administrative Procedures Act, 5 U.S.C.A. § 1101 et seq. To this the Commissioner replies that the Tax Court is not within the purview of the Act because it specifically excepts courts and applies only to agencies of the government. His reliance is upon a letter of the Attorney General to the Senate Judiciary Committee written, during the pendency of the bill, in response to an inquiry from its chairman.

"The Board of Tax Appeals was, however, by the language of the statute creating it, 53 Stats. 158, 26 U.S.C.A. §1100, 'an independent agency in the executive branch of the government.' It was so held in Old Colony Trust Co. v. Com'r, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918. When by § 504(a) of the Revenue Act of 1942, its name was changed to the Tax Court of the United States, the Act expressly provided: 'the jurisdiction, powers, and duties of The Tax Court * * * shall be the same as by existing law provided in the case of the Board of Tax Appeals.' § 504(b). When the Supreme Court came to consider, in Com'r v. Gooch Milling & Elevator Co., 320 U.S. 418, 64 S. Ct. 184, 88 L. Ed. 139, the jurisdiction of the Board of Tax Appeals to order a refund or credit a prior overpayment against a deficiency, it concluded that the Board possessed no power to grant equitable recoupment as did tribunals having general equity jurisdiction, for the Board (page 420 of 320 U.S., 64 S. Ct. 185, 88 L. Ed. 139) 'is but "an independent agency in the Exec-

utive Branch of the Government." ' That case was decided in December, 1943, after the Board of Tax Appeals had become the Tax Court of the United States. See also Hutchings-Sealy Nat'l Bank v. Com'r, 5 Cir., 141 F. 2d 422. While our conclusion is that review of the Tax Court decisions is governed by the Administrative Procedures Act, it does not become necessary, in view of our reliance upon the Bingham case, to particularize in what respect our power to review has been enlarged, except to say that it doubtless has been broadened and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review."

The Court below said on this point (R. 54):

"We think here that our judicial eye in its restricted wandering, and it is a very restricted wandering, has encountered abundantly sufficient facts to lend support to the Tax Court's conclusions."

Petitioner assumes that the restriction above referred to is based upon the *Dobson* rule and therefore contends that the Court below refuses to follow the Circuit Court of Appeals for the Sixth Circuit.

Petitioner seeks a review by the unrestricted eye of this Court.

The restricted eyesight of the Court below is best evidenced by the issue involving the 390 shares of Chelsea stock received for services in 1940. On this issue it

was not necessary for petitioner to prove the stock was worthless but only to overcome the presumption of correctness of the Commissioner's ruling that this stock was to be valued at $100 a share.

If only the facts found by the Tax Court, which were held to be insufficient to prove worthlessness, are considered, it would seem to follow that on any reasonable consideration of these facts the stock at issue certainly was worth much less than $100 a share. This weakness in the Tax Court's opinion is pointed out and commented on in the Dissenting Opinion of Judge Black of the Tax Court, which was agreed to by four Judges of the Tax Court (R. 45 a).

This Court must, by this time, be fully aware of the confusion and displeasure which has resulted from this so-called "Dobson Rule."

In the case of *Brooklyn National Corporation v. Commissioner,* 157 F. (2d) 450, C.C.A. 2nd Circuit (1946), Judge Learned Hand said, at page 452, in affirming the decision of the Tax Court:

> "* * * and, if the case were an appeal from a District Court, we should have no alternative but to reverse."

In this same case, Judge Augustus N. Hand, in his dissenting opinion, said, at page 453:

> "I am not satisfied that the dice are so heavily loaded against any decision which differs from the Tax Court that our jurisdiction is rendered almost futile, nor do I believe that the opinions of the Supreme Court call for complete abdication on our part."

See also *Kohnstamm v. Pedrick,* 153 F. (2d) 506, C.C.A. 2nd Circuit (1945).

The confusion had become so evident as a result of the Dobson case, that the Court said in the case of *National Bronx Bank of New York v. Commissioner,* 147 F. (2d) 651, 652, C.C.A. 2nd Circuit (1945), that:

> "As to Dobson's case, there seems to be considerable confusion as to whether it is a precedent for anything, and, if so, for what."

To the same effect see Randolph Paul's comments in his article, "Dobson v. Commissioner of Internal Revenue: The Strange Ways of Law and Fact" in 57 Harvard L. Rev. 753 (July, 1944).

The confusion arising after the decision in the *Dobson* case has caused an evolution of two kinds of appellate tax practice and even two kinds of justice,—one for the rich taxpayer who pays and sues for a recovery in the District Court, and one for the poor taxpayer who must take his case to the Tax Court, in the first instance.

In *Brooklyn National Corporation, supra,* the Court said that the decision would have been exactly to the contrary if the taxpayer had proceeded in the District Court rather than the Tax Court. In addition, the Tax Court has even produced completely contrary results from identical sets of facts and, because of the *Dobson* case, the Circuit Courts, and the Supreme Court of the United States, have been reluctant to reverse the Tax Court, even though such a reversal would overcome substantial injustice to taxpayers. This was the case in *John Kelley Company v. Commissioner of Internal Revenue,* 326 U. S. 521 (1946). However, Justice Rutledge, in his dissenting opinion, expressed his disgust with such an intolerable situation and said, in part:

> "The right of taxpayers to be treated with equal justice before the law is denied."

As ably stated by Norman D. Kann in his article, "The Dobson Rule and Tax Administration," 82 Journal of Accountancy #5, page 401, 413:

> "We are certainly entitled to ask ourselves if taxpayers should have decisions in their tax cases on review stand or fall depending upon the chance of which forum they choose initially. That there should be two rules of law in such situations, seems intolerable."

The instant case offers a clear example of a conflict as to effect of the Administrative Procedure Act on the Dobson Rule as well as a case where the Application of the Rule slams the door in the face of a most worthy cause.

The importance of this issue is manifest. There are many cases now pending in the Appellate Courts which would greatly benefit from either a modification or clarification of the Dobson Rule by this Court.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1948.

## APPENDIX.

Administrative Procedures Act, §1, *et seq.*, 5 U.S.C.A. § 1001, *et seq.*

"1001. *Definitions.* — As used in this Act (§ 1001 et seq. of this title)—

"*Agency.* — 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * *

* * * * * * *

"1009. *Judicial review.*—Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * * * *

"(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 (§§ 1006, 1007 of this title) or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946, c. 324, §10, 60 Stat. 243.)

26 U.S.C.A. Internal Revenue Code.

"SEC. 1100. STATUS.

"The Board of Tax Appeals (hereinafter referred to as the 'Board') shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."